

IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Income Tax

DANIELLE MC DOWELL,)	
)	
Plaintiff,)	TC-MD 050812C
)	
v.)	
)	
DEPARTMENT OF REVENUE,)	
State of Oregon,)	
)	
Defendant.)	DECISION OF DISMISSAL

This matter is before the court on Defendant’s motion to dismiss, contained in its Answer filed September 29, 2005. Defendant asserts that the appeal should be dismissed pursuant to ORS 305.280(2) because Plaintiff appealed more than 90 days after the Notice of Proposed Adjustment and/or Distribution became final under ORS 305.270. The motion was heard by the court on October 27, 2005. Plaintiff was represented by Lynn Greenough, LTC (Greenough). Plaintiff was present for the October 27, 2005, proceeding. Defendant appeared through Laurie Fery (Fery), an auditor with the Oregon Department of Revenue.

The tax year at issue is 2004. Plaintiff timely filed her return. The return claimed a \$2,370 working family child care credit under ORS 315.262.¹ Defendant reviewed the return and, by letter dated March 28, 2005, requested proof of payment of the child care expenses. That letter was returned to Defendant with a note on the envelope stating that Plaintiff no longer lived at that address. Plaintiff does, in fact, live at the address to which the notice was mailed. Plaintiff contends that she did not receive the initial notice (requesting verification of expenses) and surmises that the envelope was delivered to the wrong mailbox at the apartment complex.

¹ All references to the Oregon Revised Statutes (ORS) are to 2003.

Defendant mailed the information request letter a second time. That letter was mailed to Plaintiff at her mother's address. Plaintiff received the newly issued request for information letter, but did not submit the material requested. On May 2, 2005, Defendant issued the Notice of Proposed Adjustment and/or Distribution. That same day, Plaintiff telephoned Defendant to inquire about her refund. The employee Plaintiff spoke with explained that the credit was denied due to lack of verification. Defendant's employee allegedly explained the process for filing a written objection to the proposed refund adjustment.

Plaintiff explained that she gathered the receipts proving payment of the child care expenses and submitted that material to the court. Plaintiff's Complaint was filed on September 2, 2005. The Complaint and accompanying materials were hand delivered to the court.

Under ORS 305.270(5)(b), Defendant's May 2, 2005, notice became final June 1, 2005, 30 days after it was issued. Plaintiff had 90 days from the date the notice became final to appeal. *See* ORS 305.280(2). The 90-day deadline expired at the close of business on August 30, 2005. As indicated above, Plaintiff's Complaint was hand-delivered to the court September 2, 2005, three days after the statutory deadline.

Plaintiff acknowledges that the appeal was not timely filed, but requests leniency because the tax return was timely filed, Plaintiff is legally entitled to the credit, and she only missed the deadline by a couple of days. Moreover, the appeal was late because of an error in counting the number of days for an appeal.

The court's authority is governed by statute. The legislature prescribed a strict 90-day appeal period. There is no statutory provision that allows the court to compromise the liability under the auspices of "leniency." In fact, the court cannot even reach the merits of the case (whether the credit should be allowed) if the appeal is not filed on time. In *Plummer v.*

Department of Revenue, TC-MD No 021186B (June 23, 2003), this court dismissed as untimely an appeal of a refund allocation filed late because of a misunderstanding about the deadline, stating that “[t]here are no exceptions to the statutory limits of 90 days.” *Plummer* at 2.

Looking at other statutory provisions, the extended appeal period under ORS 305.280(3) is inapplicable because Plaintiff did not appeal an assessment of tax, but rather a refund adjustment.² And, although there is some latitude for canceling all or a portion of the tax, penalty or interest under ORS 305.295, that authority is vested in the Department of Revenue, and not the Tax Court.

Greenough made a pitch for fairness by noting that a taxpayer typically has three years to request a refund. However, as Fery noted during the hearing, the three-year rule for refunds, found in ORS 314.415, applies to original returns and not to timely returns that are audited by the department. Once a return is filed and a notice of adjustment issued, the taxpayer must comply with the statutory limits for filing objections with the department and/or appealing to the tax court.

Plaintiff was not timely in filing her appeal and the court does not have the authority to overlook Plaintiff’s tardiness, notwithstanding that she missed the deadline by only a few days. Accordingly, Defendant’s motion to dismiss is granted. Now, therefore,

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² ORS 305.280(3) provides:

“Notwithstanding subsection (2) of this section, an appeal from a notice of *assessment of taxes imposed* under ORS chapter 314, 316, 317 or 318 may be filed within two years after the date the amount of tax, as shown on the notice and including appropriate penalties and interest, is paid.” (Emphasis added.)

IT IS THE DECISION OF THIS COURT that this matter be dismissed.

Dated this _____ day of November 2005.

DAN ROBINSON
MAGISTRATE

If you want to appeal this Decision, file a Complaint in the Regular Division of the Oregon Tax Court, by mailing to: 1163 State Street, Salem, OR 97301-2563; or by hand delivery to: Fourth Floor, 1241 State Street, Salem, OR.

Your Complaint must be submitted within 60 days after the date of the Decision or this Decision becomes final and cannot be changed.

***This document was signed by Magistrate Dan Robinson November 28, 2005.
The Court filed and entered this document November 28, 2005.***